Halim bin Sutarjo v KPMB Builder Bhd (formerly known as Konsortium Peladang (M) Bhd)

HIGH COURT (MELAKA) — CIVIL APPEAL NO 1–11–46 OF 2001
LOW HOP BING J
8 MARCH 2005

Contract — Building contract — Sub-contract — Plaintiff appointed by main contractor — Defendant terminated main contractor's appointment — Whether there was contractual relationship between plaintiff and defendant

This was an appeal by the plaintiff against the decision of the magistrate who had dismissed the plaintiff's claim against the defendant.

The plaintiff claimed that he had, at the request of the defendant, completed certain works in respect of a project in Pahang and that a sum of RM17,017.90 remained owing by the defendant.

The defendant's version was that it had appointed Syarikat Funian as the contractor for the project and Syarikat Funian was required to appoint its own sub-contractors. As such, the defendant contended that the plaintiff in this case was Syarikat Funian's sub-contractor and that there was no agreement between the plaintiff and the defendant.

The issue for determination in this appeal was whether the plaintiff had discharged the burden of proving the existence of a contract between it and the defendant.

The details of the works carried out and completed had been particularized by the plaintiff and exhibited as 'exh P1' in the appeal record. 'Exhibit P1' showed a total cost of construction amounting to RM90,740.20. This exhibit bore the defendant's rubber stamp. In addition, the exhibit contained particulars of the statement of account, including the payments received by the plaintiff from the defendant.

Held, allowing the appeal:

(1) There was no submission for the defendant which could be construed as denying the accuracy or authenticity of 'exh P1' of the appeal record. From the contemporaneous documents, the plaintiff had, on a balance of probabilities, discharged the burden of proof it had carried out and completed the works in the project (see para 23).

(2) After the defendant's termination of Syarikat Funian as its contractor, the plaintiff had carried out and completed the works in the project, for which the defendant had made a partial payment. This partial payment was supported by the defendant's own payment voucher. Hence, the

plaintiff had proven on a balance of probabilities the existence of a contractual relationship between the plaintiff and the defendant for the completion of the works in the project. In the circumstances, the defendant was estopped from denying the existence of the contractual relationship (see para 25).

[**Bahasa Malaysia summary**

Ini merupakan satu rayuan oleh plaintif terhadap keputusan majistret menolak tuntutan plaintif terhadap defendan.

Plaintif menuntut bahawa beliau telah, atas permintaan defendan, menyiapkan kerja berkenaan dengan projek di Pahang dan sejumlah RM17,017.90 masih dihutang oleh defendan.

Versi defendan adalah bahawa defendan telah melantik Syarikat Funian sebagai kontraktor untuk projek itu dan Syarikat Funian dikehendaki melantik sub-kontraktor sendiri. Dengan itu, defendan berhujah bahawa plaintif dalam kes ini sepatutnya sub-kontraktor Syarikat Funian dan tidak wujud perjanjian di antara plaintif dan defendan.

Isu untuk ditentukan dalam rayuan ini adalah sama ada plaintif telah membuktikan kewujudan perjanjian di antaranya dan defendan.

Butiran kerja-kerja yang disiapkan telah dibutirkan oleh plaintif dan dieksibitkan sebagai 'eks P1' dalam rekod rayuan. Eksibit P1 menunjukkan jumlah kos pembinaan berjumlah sebanyak RM90,740.20. Eksibit ini mengandungi cop getah defendan. Tambahan pula, eksibit itu mengandungi butiran akaun penyata termasuk bayaran yang diterima oleh plaintif daripada defendan.

Diputuskan, membenarkan rayuan itu:

(1) Tiada penghujahan untuk defendan yang boleh dianggap sebagai penafian ketepatan dan kesahihan eks P1 rekod rayuan itu. Berdasarkan dokumen semasa, plaintif telah atas imbangan kebarangkalian membuktikan bahawa dia telah menyiapkan kerja-kerja berkenaan dengan projek itu (lihat perenggan 23).

(2) Setelah defendan menamatkan perjanjian Syarikat Funian sebagai kontraktornya, plaintif telah menjalankan dan menyiapkan kerja-kerja berkenaan dengan projek itu di mana defendan telah membuat sebahagian pembayaran. Bayaran sebahagian ini disokong oleh boucher pembayaran. Oleh itu, plaintif telah membuktikan atas imbangan kebarangkalian kewujudan perhubungan kontratual di antara plaintif dan defendan untuk penyiapan kerja-kerja berkenaan dengan projek itu. Dalam keadaan ini, defendan diestop daripada menafikan kewujudan perhubungan kontraktual itu (lihat perenggan 25).]

Notes

For cases on sub-contracts, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2563–2572.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)

Johara Bi Binte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor [1981] 1 MLJ 139 (refd)

Lim Soh Meng & Anor v Krishnan [1967] 1 MLJ 8 (refd)

Teh Poh Wah v Seremban Securities Sdn Bhd [1996] 1 MLJ 701 (refd)

Appeal from: Summons No 72–202 of 2000 (Magistrate's Court, Melaka)

Suria Kumar (Suria Kumar & Co) for the plaintiff.

Khairil Aznan (Abd Gani Che Man & Co) for the respondent.

Low Hop Bing J:

I APPEAL

[1] This is an appeal filed by the plaintiff against the decision of the learned magistrate who had on 12 November 2001 dismissed with costs the plaintiff's claim against the defendant for the sum of RM17,017.90 together with interest at 8% pa from 30 September 1999 to the date of realisation.

II PLEADINGS

[2] Paragraph 3 of the plaintiff's amended statement of claim averred that at the defendant's request, the plaintiff completed the balance of the works at the ITM project in Jengka, Pahang at the sum of RM17,017.90, which the defendant has failed to pay the plaintiff.

[3] That was denied by the defendant in para 3 of the defence.

III THE EVIDENCE

[4] Oral evidence has been adduced by the parties who have also produced documents before the learned magistrate.

[5] The plaintiff's version is that he has completed the balance of the contract works in the ITM project in Jengka, Pahang, after which he had informed the defendant. The total costs of the works amounted to RM90,740.20, out of which the plaintiff has received a payment of RM68,722.30. The plaintiff now claims for the balance thereof ie RM17,017.90.

[6] The plaintiff has been appointed and paid by Syarikat Kejuruteraan & Binaan Funian Sdn Bhd ('Syarikat Funian') which in turn was appointed by the defendant to do the project. However, the defendant has terminated the works of Syarikat Funian which in turn had terminated the works of the plaintiff. The plaintiff alleged that he had actually completed his works around November 1999 at the request of the defendant. The plaintiff had also met one Hj Osman who was the defendant's representative to ask for payment and was indeed paid RM5,000.

[7] The defendant's version is that it has appointed Syarikat Funian as the contractor for the project, for which the defendant received a commission of 3% on the contract price and that Syarikat Funian has to appoint its own subcontractors, recruit workers and purchase materials.

[8] The defendant's case is that the plaintiff was the sub-contractor of Syarikat Funian but not of the defendant, as there was no agreement between the plaintiff and the defendant. The defendant paid the plaintiff RM5,000 on 3 January 2000 as the plaintiff had repeatedly asked the defendant for help in order to pay the plaintiff's workers and the defendant's version is that the payment was for the festive season.

IV ISSUE FOR DETERMINATION

[9] The issue for determination by the learned magistrate and now in the instant appeal before me is whether the plaintiff has discharged the burden of proving the existence of a contract between the plaintiff and the defendant in order to render the defendant liable to pay the plaintiff for the balance of the works completed by the plaintiff in the project.

[10] In essence, the learned magistrate in her grounds of decision held that the plaintiff was appointed by Syarikat Funian and not by the defendant who had no contractual relationship with the plaintiff, as there was no written agreement to show that the defendant had appointed the plaintiff to complete the works in the project; and that the payment of RM5,000 by the defendant to the plaintiff did not prove the existence of their contractual relationship. Consequently, the plaintiff has not proved his claim against the defendant on a balance of probabilities.

[11] Mr Suria Kumar, learned counsel for the plaintiff, submitted that the learned magistrate's finding is against the weight of evidence, as the defendant had terminated the contract of Syarikat Funian and subsequently appointed the plaintiff to complete the works in the project, for which the defendant through one Hj Osman would pay the plaintiff direct.

[12] He added that the plaintiff has produced documentary evidence at pp 56 and 57 (exh P1) of the appeal record setting out the costs of works completed by the plaintiff in the project which were endorsed by the defendant's representatives,

besides the photographs at pp 59 to 62 confirming the plaintiff's completion of the works, for which the defendant has vide defendant's payment voucher dated 3 January 2000 paid the plaintiff a sum of RM5,000 which has therefore estopped the defendant from denying any liability to pay the balance sum of RM17,017.90 to the plaintiff.

[13] Mr Khairil Aznan learned counsel for the respondent contended that the defendant is not liable to pay the plaintiff's claim as the plaintiff has failed to prove that the plaintiff has done the works amounting to RM17,017.90 and that there was no contractual relationship between the plaintiff and the defendant.

[14] *Lim Soh Meng & Anor v Krishnan* [1967] 1 MLJ 8; and *Johara Bi Binte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor* [1981] 1 MLJ 139 were refereed to.

[15] *Lim Soh Meng*, concerns a running down action in which the learned trial judge had rejected the evidence of the plaintiff and that of the defendant but went on to draw some inferences which were not supported by the facts and then give judgment for the plaintiff. On appeal, the Federal Court through the judgment of Ong Hock Thye FJ (later CJ(M)) held that the learned trial judge should have decided the case on the onus of proof.

[16] In *Johara Bi*, Chang Min Tat FJ in delivering the judgment of the Federal Court held that difficult questions of law could often be resolved by considering the burden of proof.

[17] There is certainly no dispute that these two authorities have set out the principles governing the burden and onus of proof.

[18] From the submissions, pleadings and evidence of the parties herein, it is clear to me that there are two conflicting versions viz pertaining to the works done or not done; and if the works had been done, the liability to make payment therefor.

[19] In the light of the two conflicting versions, it is necessary to test the veracity and truthfulness of the testimonies by reference to contemporaneous documents in order to arrive at a proper determination. In this regard, it is significant to note that the details of the works carried out and completed as at 30 September 1999 had been particularised by the plaintiff in exh P1 at p 56 of the appeal record, which shows the total cost of construction amounting to RM90,740.20.

[20] This exhibit also bears the rubber stamp of the defendant in these words:

CONSORTIUM PELADANG (M) BHD
JOINT VENTURE KEJURUTERAAN & BINAAN FUNIAN
FUNIAN SDN BHD ITM JENGKA PAHANG

[21] Two persons viz Yong and Amin signed for the defendant immediately below the defendant's aforesaid rubber stamp.

[22] Similarly, exh P1 p 57 of the appeal record contains particulars of the statement of account, including the payments received by the plaintiff amounting to RM68,722.30 as against the total construction cost of RM90,740.20, thereby leaving a balance of RM22,017.90. The defendant had vide its own payment voucher dated 3 January 2000 in exh P2 at p 58 of the appeal record effected a payment of RM5,000 to the plaintiff who has also documented it at p 57 of the appeal record, also bearing the defendant's rubber stamp and two signatures for the defendant resulting in an ultimate balance of RM17,017.90 which is the subject matter of this appeal.

[23] Before me, there is no submission for the defendant which can be construed as denying the accuracy or authenticity of pp 56 and 57, exh P1 in the appeal record. From these contemporaneous documents, there should be finding on a balance of probabilities that the plaintiff has discharged the burden of proof that the works in the project had in fact been carried out and completed by the plaintiff.

[24] In relation to the existence or otherwise of a contractual relationship between the plaintiff and the defendant, it is trite law that a contractual relationship can be established expressly eg by way of a written agreement; or orally by word of mouth supported by credible evidence, or even implied from the conduct of the parties and contemporaneous documents. In the instant appeal, although there is no express or written agreement executed by the parties and notwithstanding the denial by the defendant of such an agreement, it is necessary to consider if such an agreement may properly be implied from the conduct of the parties and contemporaneous documents.

[25] After the defendant's termination of Syarikat Funian as its contractor, it is clear from the evidence that the plaintiff has carried out and completed the works in the defendant's project, for which the defendant has made a payment of RM5,000 to the plaintiff, which is supported by the defendant's own payment voucher expressly describing it as payment for the works in the project. Again, the finding should have been that the plaintiff has proved on a balance of probabilities the existence of a contractual relationship between the plaintiff and the defendant for the completion of the works in the defendant's project by the plaintiff.

[26] In the circumstances, the defendant is estopped from denying the existence of the contractual relationship: see *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 (FC); *Teh Poh Wah v Seremban Securities Sdn Bhd* [1996] 1 MLJ 701.

[27] Upon an analysis of the oral testimony and documentary evidence adduced by the parties herein, I am of the view that the learned magistrate has

erred in her finding which is against the weight of evidence and that she has also erred in holding that the plaintiff has not discharged the burden of proof on a balance of probabilities.

V CONCLUSION

[28] On the foregoing grounds, I hold that there are merits in this appeal which I hereby allow with costs. Hence I set aside the said order of the learned magistrate and enter judgment for the plaintiff as claimed above.

Appeal allowed.

Reported by Lim Lee Na